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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC.
Operating as the VISION INTERFAITH SATELLITE
NETWORK and ATLANTA INTERFAITH
BROADCASTERS, INC.,

Appellants,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and
the UNITED STATES OF AMERICA,

Appellees.

On Appeal from Three-Judge Court
United States District Court of Columbia

JOINT REPLY TO MOTIONS TO AFFIRM

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ARGUMENT

Appellants, National Interfaith Cable Coalition, Inc. ("NICC") operating as the Vision Interfaith Satellite Network ("VISN") and Atlanta Interfaith Broadcasters, Inc. ("AIB"), reply to the Motions to Affirm by Appellees Federal Communications Commission and United States ("Federal Respondents"), Trinity Christian Center of Santa Ana, Inc. *et al.* ("Trinity"), Corporation for Public Broadcasting ("CPB"), and National Association of Broadcasters.

This is a direct appeal from a three-judge district court decision on summary judgment that, among other things, rejected Appellants' challenge to the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), Pub. L. No. 102-385, 106 Stat. 1471-1481, 47 U.S.C. §§ 534 and 535, under the Establishment and Free Exercise of Religion Clauses of the First Amendment.

The challenged must-carry provisions require cable television system operators to devote up to one third of their channel capacity to the carriage of local broadcast television stations. The seventy-four full power commercial stations that broadcast predominantly religious programming comprise twenty-five percent of the independent or non-network stations that are entitled to carriage under the Cable Act. There are additional religious noncommercial and low power stations that have must-carry rights.

Appellee Trinity typifies the religious broadcasters. Through its satellite network, Trinity provides to its stations, as well as unaffiliated broadcasters, evangelical and charismatic Christian programming fare. With must-carry, Trinity's programming will squeeze out competing religious programming on cable and will reach into eighty percent of American households.

Appellants NICC and AIB, in contrast, provide "interfaith" — Christian, Jewish, and Moslem — programming to cable television systems via satellite and microwave signals respectively. The Cable Act only requires that "broadcast" television stations be carried. Thus, neither of the Appellants has the Congressionally-mandated right to carriage that Trinity and other religious broadcast television stations have. And, neither will have a reach that remotely compares to Trinity's.

Because there are significant numbers of religious television stations and because they are given valuable, preferred rights of access to cable subscribers, this appeal raises novel questions of whether Congress through the Cable Act has unconstitutionally provided substantial subsidies and aid to pervasively sectarian institutions, denied equal access to other religious programmers, and engaged in coercion and endorsement in connection with the dissemination of religious messages.

Appellees characterize this case as one of settled law that involves routine application of the so-called *"Lemon* test," *Lemon v. Kurtzman*, 403 U.S. 602 (1971). They argue that the Cable Act easily passes muster under *Lemon* because it is facially neutral, requiring carriage of all local broadcast stations whether religious or secular, because its secular purpose was to increase programming diversity, and because it requires no excessive government entanglement with religion.

Appellees would confine this appeal to *Lemon* in order to avoid the true issues. They discuss precedents concerning buildings and books, while ignoring the fact that the must-carry provisions were intended to, and do in fact, control speech, including religious speech. Trinity diverts attention from the fact that it alone stands to gain access to thirty six million new viewers and potential contributors from must-carry by saying that the statute confers only "incidental" benefits on religion.

Appellants raise three issues; none of which is resolved by *Lemon* and subsequent cases relied on by Appellees.

First, it is undeniable — and Appellees do not deny— that the must-carry provisions subsidize local broadcast stations. Trinity, as an example, is here to protect its subsidy, a subsidy that was expressly intended. Congress said it wanted to divert advertising revenue away from cable-only programmers and to local broadcasters for the purpose of preserving local broadcasting. Judge Williams in his dissent to the district court decision focused on Congress's desire to subsidize local broadcasters and suggested that it might have avoided problems under the Free Speech provisions of the First Amendment if it had used outright financial aid instead of must-carry rights.

Lemon notwithstanding, this Court has never validated such aid to pervasively sectarian institutions where the aid directly advanced a religious message. *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

Appellees carry *Lemon* to the extreme, implying that as long as the Cable Act has a secular purpose and is neutral on its face it is constitutional. Under their analysis, unrestricted government grants to parochial schools would be constitutional provided that the funding statute applied to public and private schools and did not specifically reference parochial schools.[1]

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[1] Congress certainly knew that must-carry would aid religious stations. CPB suggests that because CPB bars noncommercial religious stations from receiving public funds, Congress made the stations ineligible for must-carry under Section 5 (47 U.S.C. §535). In fact, religious noncommercial stations have the enhanced must-carry rights of commercial stations under Section 4 (47 U.S.C. §534), and successfully lobbied for this result.

The Court has unanimously rejected such an extension of *Lemon*. *Bowen v. Kendrick*, 487 U.S. 589.

The aid given to religious broadcasters is not exclusively financial. Must-carry gives them a far wider viewership for proselytizing as evidenced by Trinity's gaining a potential thirty six million new viewers by virtue of the must-carry provisions.

Second, Appellees avoid completely the equal access issue. They cannot reconcile the district court decision with this Court's precedents. The Court has held that, consistent with *Lemon*, government must give religious speech equal access in government-controlled forums. *Lambs Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *Board of Ed. of Westside Com. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Court, however, has not addressed the corollary issue, which is raised in this appeal, of whether the failure to provide equal access to all religious groups is constitutional or not. It has expressly left open "questions that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." *Widmar*, 454 U.S. 263, 274 n.13. Because capacity of the cable forum is limited, Congressionally-mandated carriage of religious broadcast stations necessarily denies access by other religious programmers.[2]

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[2] In their Motion to Affirm at 28 in companion appeal No. 93-44, Federal Respondents observe "this case is more closely analogous to Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)...." There a California law that required a private shopping mall to be open to political speech as a public forum was held constitutional under the Free Speech Clause. The Court did not consider whether private citizens, under the Religion Clauses, must also disseminate religious messages. In later cases, the Court has rejected such coercion in connection with religious messages. Lee v. Weisman, 112 S.Ct. 2649 (1992); Wooley v. Maynard, 430 U.S. 705 (1977); see also, Board of Ed. of Westside Com. Schools v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J. concurring).

The presence of religious litigants on opposite sides of this appeal underscores the equal access issue. Appellants are non-profit organizations that make available national and local, interfaith, religious programming to cable systems. They compete for cable carriage with each other as well as with local religious broadcast stations. But while Appellants provide programming for all faiths, broadcast stations, such as those affiliated with Trinity, program primarily for fundamentalist Christian viewers.

The Cable Act gives Trinity such a decided preference over Appellants and other religious programmers in accessing cable subscribers that as a practical matter it "establishes" Trinity's brand of religious programming.

Third, Appellees ignore the religious coercion and endorsement inherent in the Cable Act. They have cited no precedent — for there is none — to support the proposition that Congress may require private citizens to disseminate religious messages under penalty of law. While government may constitutionally tolerate religious activity on its property, its action becomes unconstitutional if there is the slightest suggestion of government coercion concerning, or government endorsement of, religious beliefs. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Wooley v. Maynard*, 430 U.S. 705 (1977).

As the very name suggests, "must-carry" is patently coercive, and the Court has been careful to examine separately the question of coercive government support or endorsement of religion when applying the *Lemon* test. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Board of Ed. of Westside Com. Schools v. Mergens*, 496 U.S. 226, 251; *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.

Religious broadcast stations need the government's help, in the form of must-carry, to secure cable carriage. Almost without exception, cable operators refused to carry the religious broadcast stations prior to the Cable Act, although they carried Appellants' interfaith offerings.

In sum, the Cable Act gives substantial financial subsidies and other aid to pervasively sectarian institutions to further their religious missions; it mandates a scheme of unequal access to cable subscribers by religious programmers; and, it coerces private cable operators into disseminating religious messages. Appellees' arguments that the district court was correct in finding *Lemon* dispositive are unresponsive to these issues. *Lemon* does not attempt to answer these questions. The Court has never sustained such violations of the Religion Clauses.

CONCLUSION

For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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